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TRANSMITTAL FORM

(to be used for all correspondence after initial filing)

Total Number of Pages in This Submission

Application Number

09/4000

09/464,000

Filing Date

09/26/2001

First Named Inventor

Guess, William Y

Art Unit

1761

Examiner Name

Becker, Drew

Attorney Docket Number

ENCLOSURES (Check all that apply)

☐

Fee Transmittal Form

☐

Fee Attached

☐

Amendment/Reply

☐

After Final

☐

Affidavits/declaration(s)

☐

Extension of Time Request

☐

Express Abandonment Request

☐

Information Disclosure Statement

☐

Certified Copy of Priority Document(s)

☐

Reply to Missing Parts/
Incomplete Application

☐

Reply to Missing Parts
under 37 CFR 1.52 or 1.53

☐

Drawing(s)

☐

Licensing-related Papers

☒

Petition

☐

Petition to Convert to a
Provisional Application

☐

Power of Attorney, Revocation

☐

Change of Correspondence Address

☐

Terminal Disclaimer

☐

Request for Refund

☐

CD, Number of CD(s) _____

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Landscape Table on CD

☐

After Allowance Communication to TC

☐

Appeal Communication to Board
of Appeals and Interferences

☐

Appeal Communication to TC
(Appeal Notice, Brief, Reply Brief)

☐

Proprietary Information

☐

Status Letter

☒

Other Enclosure(s) (please identify
below):

Remarks

Petition to withdraw improper notice of abandonment

Credit card form USPTO 2038

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name

Signature

William Y. Guess

Printed name

William Y. Guess

Date

11/20/2007

Reg. No.

CERTIFICATE OF TRANSMISSION/MAILING

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below:

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William Y. Guess

Date

11/20/2007

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No. : 09/964,000 Confirmation No. 3019
Applicant : William Y. Guess
Filed : 09/26/2001
TC/A.U. : 1761
Examiner : Becker, Drew

Mail Stop Petition

Commissioner for Patents

P.O. Box 1450

Alexandria, Va 22313-1450

**Third and Final Petition to Withdraw the Improper Notice of
Abandonment and to Advance the Appeal of the Above
Application
And notice of intent to sue.**

Sir,

Petitioner has a right, pursuant to Title 35 Section 134, to appeal a final, adverse decision of the examiner and did so by way of a notice of appeal filed 06/09/2005.

Petitioner timely filed an appeal brief on 08/05/2005 regarding the above application.

The notice of non-compliant appeal brief is fatally flawed.

The examiner sent an improper notice of Non-Compliant Appeal Brief on October 13 2005. The notice was improper in that the only box checked on this form was toward heading box IV relative to the requirement of 37CFR 41.37 (c) (1) in which a detailed summary of the invention is required. It was the summary that which the examiner stated was not property done. No summary is required by appellants not represented by a registered practitioner.

The required contents of the summary are described in 37CFR 41.37 (c) (1) (v). However this assertion by the examiner proposed a legal impossibility in that the Appeal Brief rule clearly and unconditionally requires nothing from applicants under headings (v) and (vi) when those applicants are not represented by a registered practitioner as is the case with petitioner. This language is clear, and again, unconditional. At the time, petitioner believed this to be a simple oversight by the examiner, in that presumably not many *pro se* appeals are filed. Within the required time period to respond (30 days), petitioner filed a response containing the following:

“In response to the Notification of Non-Compliant Brief, applicant disagrees and directs the examiners [sic] attention to 37 CFR § 41.37 (c) (1) which states clearly that appellants ‘not represented by a registered practitioner need only substantially comply with paragraphs (c) (1) (i)

through (iv) and (c) (1) (vii) through (c) (1) (x) of this section'. Pursuant to this clear language, appellant is not required to include either a summary of the invention under heading (v) or the grounds of rejection under heading (vi). Appellant included items under these headings as a courtesy to the board such that a single document (the brief) would contain the relevant, albeit in the case of the summary, cursory information. Appellant's invention is very simple."

Again, the above response was done so in a timely manner as stated within the notice.

Again, petitioner believed the form letter sent by the examiner stating the impossible was a mistake, much like petitioner's credit card information¹, including account number plus expiration date, being published on the internet by the USPTO. No harm was done in the second mistake, in that the applicant had that account cancelled. Harm is being done relative to the current situation regarding the improper notice of defective brief all based on examiner error.

The examiner's letter in response to applicant's response contains nothing accurate and set a "tacky trap" for the appellant.

Over five months following the improper notice of defective brief, the examiner sent, not a form, but an unusual appearing letter, with no specific heading, in which the first sentence thereof states again that the appeal brief does not contain a proper description of the invention under heading V of the brief.

¹ See attached PTO 2038 form

Contained within the above letter may be found the following in which the examiner states:

In the letter of 10/18/05 appellant argues that a pro se applicant need only “substantially comply” with this requirement. However, because there are 35 U.S.C. 112(1) new matter rejections of all the appealed claims, this requirement will not be waved [sic]. (emphasis added)

Other than indicating a timely response by the appellant, these two sentences contain nothing accurate. The rule regarding the brief does not require the appellant to supply anything under headings V and VI. Title 35 Section 112 first paragraph makes no mention of “new matter”. There are no outstanding “new matter” rejections toward any of the claims contained within the final rejection of the instant application, much less all of them. The words “pro se” appear nowhere in the alluded-to rule. It is further interesting to note that the most important word in the above passage is misspelled, namely: “waved”. Also petitioner has never seen the first paragraph of Section 112 indicated as “35 U.S.C. 112(1).

Appellants are only required to “substantially comply” with headings (i) through (iv) and (vii) though (x). Petitioner has filed other appeal briefs that contain nothing under the headings (v) and (vi) other than a reference to the rule. (See ser. number. 10/109478, this application is much more complicated than the simple two and three element claims of the instant application.)

The examiner goes on to state:

It is in appellant's best interests (*sic*) to provide evidence of support for all the rejected claim limitations so that the Board of Patent Appeals and Interferences can make an informed decision on this issue.

Petitioner felt surely that the lack of tolling of the time to respond to this bizarre letter was yet another error by the examiner. Quite the contrary, it would appear that the examiner took so long to respond to petitioner's recitation of the relevant rule in order to trap petitioner into his current predicament. This is very unfortunate and unfair. It is also arbitrary (see 10/109478 lack of anything under heading (v) and extremely capricious. And in complete frustration, and in response to this bizarre letter, petitioner filed a second albeit superfluous brief on 05/05/2006. And, much quicker than with any other response from this examiner, a notice of abandonment was filed on 05/19/2006. A trap had been set and sprung by the examiner.

Petitioner believed the response of October 13 2005 to be in order. Waiting until two weeks prior to the six month deadline to inform petitioner of the "rule change" and the lack of tolling, had the effect of increasing the cost of the potentially issued patent by enormous amount due to time extension fees. Beyond that it took this pro se applicant more than 2 weeks to rewrite the brief.

A first petition is filed around two weeks after the notice of abandonment, which, to date, has never been addressed by the USPTO.

After receiving the improper notice of abandonment, petitioner filed on 06/02/2006, a petition containing the relevant facts requesting, that the abandonment be withdraw and the appeal go forward. And, according to the image file wrapper This petition was assigned to the Technology Center SPRE. To date, this petition has not been answered by the SPRE or anyone else after apparently falling into some sort of administrative “black hole”.

A Second petition is dismissed due to a glaring though critical error by the office of petitions.

After waiting more than six months for a response to the first petition, a second petition was filed on 02/02/2007. **This petition was dismissed due to a critical, though glaring, error by the office of petitions.** In the dismissal the Senior Petitions Attorney states:

The application was held abandoned on November 15, 2005, for failure to file a timely response to the Notice of Non-Compliant Appeal Brief mailed, October 13, 2005. The Notice set a one month or 30 day period for reply. A response filed October 21, 2006 was followed up by a second Notice of Non-Compliant Appeal Brief mailed March 29, 2006. [emphasis added]

It should be apparent that the Senior Petitions Attorney signed this document without reading it very carefully. The date of response by the appellant was, and is, critical toward these issues. The date of response was Oct 21, 2005 *not* Oct,

21, 2006 as incorrectly stated in the petition dismissal. Petitioner's response should have advanced the appeal but did not. No action after petitioner's response of Oct. 21, 2006 has been legally proper by the USPTO.

This situation is actionable under the Administrative Procedure Act. Given the sheer number and severity of errors committed by the Office, petitioner will give the PTO one last opportunity to, allow each and every claim or write and submit an answer, docket the case and proceed with the appeal; otherwise an APA complaint will be filed no sooner than sixty days following the filing of this, the third (and final) petition to withdraw the improper notice of abandonment.

These errors include:

The improper notice of non-compliant appeal brief by the examiner relative to applicants first appeal brief.

The examiner countering appellant's timely response and recitation of the relevant rule with misstatements and a position clearly at odds with the CFR.

The "re-writing" of a federal regulation by the examiner who possesses no authority to do so.

The continued ignoring of applicant's first petition by the Technology Center's SPRE.

The critical, glaring error by the Senior Petitions Attorney in the dismissal of applicant's second petition.

Conclusion:

It seems a sad irony that a patent office rule intended to assist *pro se* applicants could be the focus of such relentless, constitutional, statutory and regulatory perversities regarding a *pro se* drafted, filed and prosecuted application.

A Notice of Intent to Sue will be sent, concurrent with this petition, to the USPTO Office of Solicitor, in petitioner's desperate hope of avoiding even more agonizing delay and financial misery relative to this case. Hopefully this notice may aid in rendering unnecessary, a legal action in the event this petition goes the way of the others. A copy of this petition will be attached to the notice.

Respectfully submitted,

William Y Guess

11-20-07

William Y Guess

Applicant *pro se*